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In The

Supreme Court of the United States

October Term, 1958

No. [redacted]

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA,

Appellee.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS

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In The

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No. 466

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA,

Appellee.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS

The Attorney General of North Carolina in behalf of the State of North Carolina, Appellee, moves to dismiss this appeal and to affirm the judgment below, for the following reasons:

(1) For that the judgment of the Supreme Court of North Carolina is grounded upon and rests upon an adequate, tenable, non-federal basis.

(2) For that any federal question attempted to be raised by the Appellants and for which review is now sought before this Court was not timely or properly raised before the trial court and was not expressly passed upon by the Supreme Court of North Carolina.

(3) For that the federal question attempted to be raised by the Appellants on the issue of former jeopardy because of defect in the original warrants does not present a substantial federal question.

(4) For that the decision of the Supreme Court of North Carolina rests upon a separate and independent, adequate and tenable non-federal ground independent of any decision of a federal question.

STATEMENT OF THE CASE

It is important that this Court understand the way and manner in which this case arose and the various steps taken in connection with the two trials, both of which have been passed upon by the Supreme Court of North Carolina. The Appellee, State of North Carolina, gives a summary of the events as follows:

(a) The Appellants are six colored men, and they were originally indicted on warrants issued from the Greensboro Municipal-County Court upon charges of having violated Sec. 14-134 of the General Statutes of North Carolina, which in part reads as follows:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days."

(b) The Court will note that the above warrants charged the Appellants with unlawful and willful trespass "upon the property of Gillespie Park Golf Course, Greensboro, North Carolina, after being forbidden to do so." The Appellants were found guilty in the Municipal-County Court on February 6, 1956, and appealed to the Superior Court, which is a Court of General Jurisdiction, and where the cases were consolidated for trial.

(c) During the progress of the trial in the Superior Court

the prosecuting officer obtained the permission of the Court to amend the warrants so that they would read or describe the trespass as having been committed upon the premises of "Gillespie Park Golf Club, Inc., after having been forbidden to enter said premises and not having a license to enter said premises ****." The jury returned a verdict of Guilty as to each Defendant, and the Defendants (Appellants herein) appealed to the Supreme Court of North Carolina.

(d) The Supreme Court of North Carolina decided on the appeal that when the prosecuting officer amended the warrant so as to charge a trespass upon the property of a person other than that named in the original warrant, then one criminal charge was substituted for another and that under local State practice this was a fatal variance, and the judgment was arrested. In arresting the judgment the Justice who wrote the opinion for the Court said:

> "Defendants may, of course, now be charged under the original warrant since the Court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment."

This was amplified by Mr. Justice Parker in a concurring opinion, when he said:

> "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

This language will become important later on when we discuss the Appellants' plea of former jeopardy. This case is reported as; STATE v. COOKE, ET ALS. 246 N. C. 518, 98 S. E. 2d 885.

(e) The above opinion of the Supreme Court was filed on June 28, 1957. While the first case was pending in the Supreme Court of North Carolina the Appellants instituted an action in the United States District Court for the Middle Dis-

trict of North Carolina against the City of Greensboro, the Greensboro City Board of Education and the Gillespie Park Golf Club, Inc., and secured a general declaration from that Court to the effect that the Appellants could not be denied because of color equal privileges to use the golf course in question (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562; Affirmed: CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425). Further along in this argument we will show the Court that the State of North Carolina has never denied the right of colored citizens to play on the golf course if they met the same eligibility conditions that were required of white persons. The decision of the Circuit Court of Appeals is dated June 28, 1957. The Court will further note that the State of North Carolina was in no manner made a party to this civil action in the Federal Court.

(f) On the 2nd of December, 1957, the Appellants were indicted again on new warrants issued from the Greensboro Municipal-County Court again charging the violation of G. S. 14-134, above quoted, and this time charging that the trespass was committed upon the premises of "Gillespie Park Golf Club, Inc. after having been forbidden to enter said premises." The Appellants moved in the Municipal-County Court to quash the warrants, and this being overruled they entered pleas of Not Guilty, and upon being convicted the Appellants appealed to the Superior Court where the cases were consolidated for trial and were heard at the February 3, 1958, Criminal Term of Guilford County. The Defendants renewed their Motions to Quash as originally made, and these Motions were overruled by the Court. The Appellants were found Guilty by the jury and again appealed to the Supreme Court of North Carolina where the case was again heard, and the Supreme Court of North Carolina in an opinion filed June 4, 1958 found no error in the trial below (STATE v. COOKE, ET AL., 248 N. C. 485, 103 S. E. 2d 846). The opinion of the Supreme Court of North Carolina, relating to the first trial, is set forth in Appendix "C" of the Appellants on p. 55, and the opinion of the Supreme Court of North Carolina, in the second case, the same being the opinion and judgment from which this appeal has been noted, appears in the Appellants'

Statement as to Jurisdiction as Appendix "A" on p. 42, and the Judgment appears as Appendix "B" on p. 54. For this reason the two opinions will not be duplicated.

(g) The contentions of the Appellants made in the last trial (the trial that is now being reviewed) are stated in their Motion to Quash, which appears in State Record on p. 28. The Court will note that the constitutionality of G.S. 14-134 is not specifically attacked or brought in question but the application, or administration, of the statute is the subject of constitutional attack by the Appellants. The appellants contend also that the State of North Carolina cannot prosecute them since the decision in the Federal Court because of the Supremacy Clause of the United States Constitution, and they also invoke the doctrine of collateral estoppel. The Appellants further contend that under the circumstances in this case they would be placed again in jeopardy contrary to the Fifth Amendment of the Constitution of the United States "as incorporated into the Fourteenth Amendment." These are the essential contentions of the Appellants.

ARGUMENT

I

THE QUESTION OF RACIAL DISCRIMINATION IN THE USE OF THE GOLF COURSE WAS NOT INVOLVED IN THIS CASE.

Strange as is may seem, the Appellants have attempted at all times to convert this case into one of racial discrimination when the evidence clearly shows that such a question was not involved. This is also shown by the instructions of the trial court given to the jury and by the opinion of the Supreme Court of North Carolina. The Appellants introduced into evidence certain leases and deeds to show the status of the golf course property. The construction and effect of these leases and deeds would be a question of local State law, and we should not be required to cite authority to support this point. The introduction of these exhibits begins on State Record,

p. 52. The effect of these instruments is so well stated by the Supreme Court of North Carolina in its opinion that we quote from the opinion to explain this situation. The quotation from the opinion also contains certain bylaws adopted by the Lessee which are important in the case. So far as eligibility to play on the golf course is concerned all races are bound by these bylaws, and we think they are valid unless administered in a discriminatory manner. The quotation is as follows:

> "Defendants offered in evidence a lease dated 19 April 1949 from the Board of Trustees of the Greensboro City Administrative Unit to Gillespie Park Golf Club, Inc. This lease recited that the property therein described had in 1947 been leased to the City of Greensboro so that the city might operate a golf course thereon, that Greensboro had agreed to cancel its rights under the lease, that lessor was of the opinion that it would not need the property for school purposes during the next ensuing five years and 'since a nine hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued during the term of this lease, such use being, in the opinion of the Board of Trustees, a public or semipublic use.' The lease was for a period of five years at a rental of $1000.00 per annum, but with a provision that lessor might cancel upon sixty days' notice if the property was needed for school purposes or if lessor desired to sell. An extension agreement was put in evidence extending lessee's term. The asserted trespass occurred during the extended term.
>
> "There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements. Defendants offered in evidence bylaws adopted by lessee. The only two which may have any pertinency to this action are sections 1 and 2 of article 1. They provide: 'SECTION 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the

course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board. SECTION 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests.'

"The City Administrative Unit, a governmental agency separate and distinct from the City of Greensboro, had no authority to operate recreational facilities which were not in some way related to the operation of the public school system. The Legislature created both County and City Administrative Units 'for purposes of school administration.' G. S. 115-4. The Administrative Unit, having acquired more land than was presently needed for school purposes, had legislative authority to lease the surplus. G. S. 115-126 (5), *Cline v. Hickory*, 207 N. C. 125, 176 S. E. 250; 38 Am. Jur. 169. In the exercise of its discretion it could in good faith lease for a public or a private purpose. Prior to its lease to Gillespie Park Club, it had leased the property to the City of Greensboro. The City had apparently used it for recreational purposes and had erected a golf course thereon. When that lease terminated, the school authorities leased to a private corporation, but in their lease were careful to state that lessee was taking and would use it for public or semipublic purposes, namely, the operation of a golf course. Having expressly declared that the use which the lessee would make was a public or semipublic use, the law will presume the parties intended and contemplated that the property should be used without unlawful discrimination because of race, color, religion, or other illegal classification. 'It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful.' *Beasley v. R. R.*, 145 N. C. 272; *Newberry v. City of Andalusia*, 57 So. 2d 629. Since the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. This Court gave definite recognition to the principle of equality of treatment as between whites and Negroes nearly three quarters of a century ago. *Puitt v. Commissioners*, 94 N. C. 709.

"*Dawson v. Mayor and City Council of Baltimore City*,

220 F. 2d 386; *Lawrence v. Hancock*, 76 F. Supp. 1004; *Tate v. Department of Conservation and Development*, 133 F. Supp. 53; *Culver v. City of Warren*, 83 N. E. 2d 82, cited and relied upon by appellants are but applications of an established legal principle to the factual situations found to exist is each of those cases. This case in no wise questions the soundness of the legal principles there enunciated."

The Court will further note that the trial judge charged the jury that the City of Greensboro could not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the operation of the course and that the lessee could not exclude either defendant because of his race and that the defendants were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation of the golf course (see instructions of trial court, State Record p. 85).

The evidence shows that the Gillespie Park Golf Club, Inc., the Lessee, acquired the golf course when it consisted of only nine holes and that the corporation invested about $100,000 in improvements and expanded it into an 18-hole golf course, and, further, they built a club house at a cost of about $5000. The President testified that "Members of other golf clubs were not entitled to play our golf course without first filing an application with the Club. Only our members had a right to play on the golf course." He further testified that the right to play included invited guests of members in good standing and also members in good standing of other clubs that were members of the Carolina Golf Association (see State Record p. 75). When the Appellants arrived at the golf course they went into the golf shop where Mr. Clyde Bass, Assistant Professional, was present, and demanded that they be allowed to play golf. They were told by Mr. Bass that the course was for members and their invited guests only and that they could not play. Five of them dropped 75¢ on the counter, which money was not accepted, and after being told that they could not play they went ahead and played anyway. When the Manager and Golf Professional arrived at the Club he was

told of the situation and that the Appellants did not have permission to play. He ordered the Appellants to leave and when they did not, he called the Deputy Sheriff. However, the Appellants continued to play until they completed nine holes of golf in a playing time of 1-1/2 to 2 hours. The evidence of Mr. Edwards, the Golf Professional, State Record p. 42) shows the different types of membership and that lockers were maintained for no persons other than members. The evidence further shows that the Appellants did not show any credentials or anything that would show that they had a right to play on the course or that they belonged to a club that was a member of the Carolina Golf Association. In other words, nothing was presented to show that they belonged to a club that was a member of an association which granted reciprocal privileges with this golf club (see State Record, p. 45). The Appellants were never told they could not play because they were colored, nor, in fact, did the question of race enter into the matter at all, and the evidence clearly shows that so far as the Manager and Supervisor of the golf course was concerned he was only interested in their eligibility to play just as he would be if any other person presented himself and said he was going to play.

The trial judge recognized that color had nothing to do with the right of Appellants to play on the golf course and so told the jury, and the Supreme Court of North Carolina recognized that fact and further stated that it (the Supreme Court of North Carolina) did not question the soundness of the legal principles set forth in DAWSON v. MAYOR AND CITY COUNCIL OF BALTIMORE CITY, 220 F. 2d 386; LAWRENCE v. HANCOCK, 76 F. Supp. 1004; TATE v. DEPARTMENT OF CONSERVATION AND DEVELOPMENT, 133 F. Supp. 53; CULVER v. CITY OF WARREN, 83 N. E. 2d 82.

We do not understand that the Appellants have superior privileges because of their color but we do understand that they cannot be discriminated against because of their color. Appellants are subject to the same eligibility conditions as any other race. This point was expressly decided in FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF

NORTH CAROLINA, 134 F. Supp. 589, where a 3-Judge District Court decided that eligible Negroes could not be prohibited from attending the University of North Carolina because of their color. The Court was careful to say, however, that the Board of Trustees of the University had the power to decide as to whether or not applicants for admission were eligible, the Court saying:

> "But we decide only that the Negroes as a class may not be excluded because of their race or color; AND THE BOARD RETAINS THE POWER TO DECIDE WHETHER APPLICANTS POSSESS THE NECESSARY QUALIFICATIONS. This applies to the plaintiffs in the pending case, as well as to all Negroes who subsequently apply for admission (Emphasis ours)."

There being no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the golf course (State Record, p. 75) the Appellants were simply not eligible to play on the golf course, and it was not a question of color.

The Appellants had prepared for sometime to make a test case. They communicated with an attorney and obtained an opinion (State Record, p. 48). In summary: The Appellants were excluded from the golf course, not because of any racial reasons, as it was well understood that color had no place in such exclusion, but because Appellants simply refused to show that they were eligible to play on the golf course, and under such conditions persons of the while race would have been equally excluded. The case was decided on the point of eligibility, and the jury was specifically told that so far as color was concerned the Appellants had as much right to play on the golf course as any person of any other race.

II

THE APPELLANTS DID NOT PROPERLY PRESENT ANY CONSTITUTIONAL QUESTION RELATING TO THE EFFECT OF THE FINDINGS OF FACT AND JUDG-

MENT OF THE FEDERAL COURT.

Before the Supreme Court of North Carolina the Appellants relied greatly upon the fact that the District Court of the United States had made certain adjudications in their favor (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562; Affirmed CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425) and that because of the doctrine of collateral estoppel the State was bound by the Federal Court judgment, and this gave the Appellants, so they contend, the right to play on the golf course.

The fact remains, however, that while the Appellants had the Record of the proceedings in the Federal Court in their custody and examined the Deputy Clerk of the Federal Court in regard to the identity of same (see State Record, p. 69) the Appellant never at any time offered this Federal Record in evidence. In fact, the Appellants themselves say in their statement as to jurisdiction filed in this Court, as follows:

> "The Record is silent as to the identification of these Federal Court Records as Exhibits 6 and 7, but the Supreme Court of North Carolina says in its opinion in this case the following with reference to said Federal Court Records:
>
> " 'Although the defendants had the Record in that case identified, they did not offer it in evidence.' " (See State Record, p. 77)

The Appellants try to say that these were Exhibits 6 and 7 but if this Court will examine the State Court Record it will find that Exhibits 6 and 7 do not appear in the Record at all, and we do not know what Exhibits 6 and 7 may be. The State not being a party to the action in the Federal Court, which was Civil in nature, was certainly not bound by any judgment in the Federal Court in a criminal prosecution with different burden of proof and different issues.

The doctrine of collateral estoppel has been applied by this Court in various cases, but it is believed that it has always been between the same parties.

See:

YATES v. UNITED STATES, 354 U. S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064;
U. S. v. OPPENHEIMER, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68;
SEALFON v. UNITED STATES, 332 U. S. 575, 92 L. ed. 180, 68 S. Ct. 237.

It will be observed that the above cases all represent situations where both cases were tried in the Federal Courts and not the situation where one case is tried in Federal Court and the other case is tried in the State Court.

See, also, other cases on the subject, as follows:
CROMWELL v. COUNTY OF SAC, 94 U. S. 51, 24 L. ed. 681;
SOU. PAC. R. R. CO. v. UNITED STATES, 168 U. S. 1, 48, 42 L. ed. 355;
BANKERS COAL CO. v. BURNET, 287 U. S. 308, 77 L. ed. 325;
TAIT v. WESTERN MD. RY. CO., 289 U. S. 620, 623, 77 L. ed. 1405.

There are also several cases in the various District Courts and Circuit Courts of Appeal, as follows:

THE EVERGREENS v. NUNAN, 141 F. 2d 927, 928;
ENGINEERS CLUB OF PHILADELPHIA v. UNITED STATES 42 F. Supp. 182, 187;
UNITED STATES v. SILLIMAN, 167 F. 2d 607, 612;
BUROMIN CO. v. NATIONAL ALUMINATE CORP., 70 F. Supp. 214, 218;
UNITED STATES v. BOWER, 95 F. Supp. 19, 21;
HEDDEN v. UNITED STATES, 105 F. Supp. 1010, 1017;
CHARLES E. HARDING CO v. HARDING, 88 A. L. R. 563, Annotation p. 574.

It is believed that North Carolina follows the usual rule as to collateral estoppel where it is based upon sufficient evidence. See:

KING v. NEESE, 233 N. C. 132; 63 S. E. 2d 123;
COACH CO. v. STONE, 235 N. C. 619, 621; 70 S. E. 2d 673;

HERRING v. COACH CO., 234 N. C. 51, 53, 54; 65 S. E. 2d 505;

CANNON v. CANNON, 223 N. C. 664, 669; 28 S. E. 2d 240.

The Appellants having failed to properly present their case and to introduce into evidence the Record developed in the Federal District Court as a last resort say that the Supreme Court of North Carolina should take judicial notice of the facts and the law in the SIMKINS case. There are two fallacies in this position: (1) In their Motion to Quash, the Appellants said they would introduce the Record in evidence, and (2) The trial court was never asked to pass upon the question of judicial notice (see State Record in the whole case, p. 30).

This position, however, was considered by the Supreme Court of North Carolina in its opinion, and while the Supreme Court of North Carolina recognized the supremacy of the federal decisions, recognizing the right of colored people to play on golf courses and attend recreation centers without discrimination, nevertheless, it is believed that the Court's opinion is based on the principle that it did not have to take judicial notice of the judgment and facts in the federal case. There are many cases cited to support this position but it seems to us that one case is decisive. In the case of SCHULER v. ISRAEL, 120 U. S. 506, 30 L. ed. 707, the plaintiff had brought suit in the Circuit Court of the City of Saint Louis, Missouri, against Israel on a note. Israel appeared and filed an Answer and set up as a defense that before the institution of the present suit in the Missouri Court, the plaintiff had commenced an action on the same note in the Circuit Court of the United States for the Northern District of Texas and had recovered judgment against Israel and that the note was merged in the judgment, and, therefore, no judgment could be rendered for the plaintiff in the State Court. In disposing of this contention, Mr. Justice Miller said:

"While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action it may be pleaded as a defense to the action in the court where it is pending and undecided. *Neither court would be bound to take notice of the judgment in the other court judicially,* but when the matter is pleaded in due time and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered." (Emphasis ours)

It is not believed that the interpretation of a State court as to when it will take judicial notice or questions as to the competency of evidence results in a federal question.

III

THERE IS NO SUBSTANTIAL QUESTION AS TO FORMER JEOPARDY.

As we pointed out in the Statement of the Case in the first trial the Supreme Court of North Carolina decided (STATE v. COOKE, ET AL., 246 N. C. 518, 98 S. E. 2d 885) that the prosecuting officer did not have a right to amend the warrant so as to charge another ownership or possession of the property on which it was alleged the trespass was committed. The Court said that this was a fatal variance and cited previous decisions to support its view. The Appellants rely on a statement in the opinion that they could again be tried on bills found in the Superior Court or under the original warrant. However, it is pointed out in the concurring opinion that they should be tried again on new warrants, and the former trial on the old warrants would not be a bar. The Record shows that the Appellants were tried on new warrants issuing from the Greensboro Municipal-County Court, and this was correct. Mr. Justice Rodman, who wrote the opinion

in the case now before the Court, also wrote the opinion in the first trial. In holding that the new warrants were proper and not bills of indictment, Mr. Justice Rodman pointed out that in the first opinion he had overlooked the Proviso to G. S. 7-64, which denied to the Superior Court in Guilford County the right to exercise concurrent jurisdiction with inferior courts. On this point and in the opinion now before the Court, Mr. Justice Rodman said:

> "The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G. S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G. S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass, after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: 'It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments.'"

It has long been held in North Carolina that a variance in a bill of indictment or warrant does not create a situation in which former jeopardy attaches.

STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert. den. 342 U. S. 381, 96 L. ed. 629;

STATE v. MARSH, 132 N. C. 1000, 43 S. E. 828;

STATE v. JOHNSON, 226 N. C. 266, 37 S. E. 2d 678.

It is believed that this position is also in accord with the position of the United States Courts on the subject.

HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559;

STROUD v. UNITED STATES, 251 U. S. 15; 64 L. ed. 103;
BURTON v. UNITED STATES, 202 U. S. 344, 378, 50 L. ed. 1057;
BROCK v. NORTH CAROLINA, 344 U. S. 424, 97 L. ed. 456;
GAVIERS v. UNITED STATED, 220 U. S. 338, 342-343, 55 L. ed. 489;
UNITED STATES v. OPPENHEIMER, 242 U. S. 85, 87, 61 L. ed. 161;
UNITED STATES v. JONES, 31 F. 725;
WALKOFF v. UNITED STATES, 84 F. 2d 17;
AMRINE v. TINES, 131 F. 2d 827;
UNITED STATES v. AGRESTI, 39 F. Supp. 16;
UNITED STATES v. PISATURO, 58 F. Supp. 546;
UNITED STATES v. NARRAEZ-GRANILLO, 119 F. Supp. 556.

It would seem that the Supreme Court of North Carolina applied the simple rule as to whether or not the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment.

It will further be seen that the Appellants did not follow the State practice in raising the question of former jeopardy. On this point the Supreme Court of North Carolina said, in STATE v. HICKS, supra:

> "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is always to be determined by the court from an inspection of the two indictments. *S. v. Nash, supra.* Whether the same evidence would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. *S. v. Bell, supra.*
>
> "When these rules are laid alongside the case at bar, it is clear that the judge rightly refused to submit to the jury the two specific issues tendered by the defendant

and rightly rejected the plea of former acquittal. The plea merely set forth the several indictments and the result of the former trial, and drew the legal conclusion from these bare matters that the defendant was being twice put in jeopardy for the same offense. It did not aver any facts *dehors* the record showing the identity of the crimes charged in the former indictments with those described in the present one. These things being true, the plea was insufficient, for it revealed on its face the non-identity of the several offenses. The defendant's legal standing would not be bettered a whit, however, on this phase of the case if his plea of former acquittal had gone beyond the record and invoked the extrinsic testimony. This is so because evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company will not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company. *S. v. Hicks, supra; S. v. Crisp*, 188 N. C. 799, 125 S. E. 543."

On the point of former jeopardy, as well as the point of the introduction of the Federal Record in evidence, the Appellants complain that under State practice the Supreme Court of North Carolina said in substance that a Motion to Quash was the proper method of testing the sufficiency of the warrant, information or bill of indictment to charge a criminal offense but it was not a means of testing the guilt or innocence of the defendant and that on such a Motion the Court could not consider extraneous evidence or evidence *aliunde* the record, and for this position the Supreme Court of North Carolina cited STATE v. COCHRAN, 230 N. C. 523, 53 S. E. 2d 633. The Appellants say that to the contrary in STATE v. PERRY, 248 N. C. 334, 103 S. E. 2d 404, a colored defendant was allowed to successfully attack a bill of indictment on the grounds of systematic exclusion of Negroes by a Motion to Quash which requires evidence in such case outside the record. The answer to this is that under the North Carolina practice an attack on the trial panel for race exclusion is made by a challenge to the array (STATE v. KIRKSEY, 227 N. C. 445, 42 S. E. 2d 613) and to challenge the constitution of the grand jury for racial reasons it is especially provided by statute that a Motion to Quash shall be used (STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814).

G. S. 9-26 of the North Carolina Code is in part as follows:

> "All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue by motion to quash the indictment, and if not so taken the same shall be deemed to be waived."

The Appellants also raise the question that the Supreme Court of North Carolina had previously held (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295) that the statute was only applicable to the possession or right of possession of real estate privately held, and that in the Clyburn case the Appellants, who were colored people, were allowed to raise the question that in merely exercising constitutional rights such can be shown and taken advantage of under a motion for nonsuit. The answer is that the Appellants were allowed to show in the actual trial, if they could do so, that they entered upon the premises upon a *bona fide* belief of a right to so enter. The Supreme Court of North Carolina has not changed its rule in interpreting the statute because the evidence showed that the property was in the possession of a private corporation even though it was impressed with a non-discriminatory use. The cases decided by the Supreme Court of North Carolina on this point all appear in the case of STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424, and as pointed out by the Supreme Court of North Carolina the Appellants never at any time denied the fact that the corporation named in the warrant had physical possession of the property nor did they ever deny that they took possession over the protest of the agent of the corporation.

IV

THE EFFECT OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Appellants contend that under Article VI, Clause 2, of the Federal Constitution, the Supreme Court of North Carolina was bound to recognize the federal cases dealing with golf courses, and when this is done Appellants should be declared Not Guilty.

The answer to this is that the Supreme Court of North Carolina did recognize the principles decided by the federal cases, and the trial judge also instructed the jury on the same principles but the Supremacy Clause does not require State Courts to accept facts found in the Federal Court in which the State was not a party.

The Supreme Court of North Carolina has always recognized the decisions of the Supreme Court of the United States as being the Law of the Land, and although the Supreme Court of North Carolina did not agree with the interpretation of this Court in the Brown case, (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163,) nevertheless, the Court said:

> "However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown* case is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid."

Because the Appellants are colored people, the Supremacy Clause of the Federal Constitution does not overleap all State practice in properly raising federal questions in the trial court nor does it relieve Appellants of the same conditions of eligibility for the use of a privilege that are required of all races. We are fully aware of what this Court said in the case of COOPER v. AARON, U. S. , 3 L. ed. 2d 5, and, as we have shown, the Supreme Court of North Carolina agrees with this position. If the Supreme Court of North Carolina had refused to apply this principle, then, of course, the question would be different, but the fact remains that the State Court in this instance and in all others has recognized the Supremacy Clause when it is applicable.

V

APPELLANTS ARE REQUIRED TO PRESENT FEDERAL QUESTIONS IN STATE COURTS ACCORDING TO STATE PRACTICE.

While we agree that Appellants must have an opportunity afforded by State practice to present federal questions we also think that it is the rule that State practice must be followed, and State procedure controls in the presentation of federal questions or constitutional questions. In this case Appellants filed a Motion to Quash alleging certain facts by which they hoped to take advantage of the doctrine of collateral estoppel and which they did not support by evidence. Appellants had the right to contend that they had a right to go upon the premises in question, and this view was submitted to the jury with proper instructions that they could not be excluded because of race. It is clear that Appellants were not entitled to play on the golf course because of the membership conditions and bylaws which had nothing to do with race and which were applicable to all persons and races alike, and it was upon this theory that the case was tried and decided. In this sense the present case has no comparison to the case of MARSH v. ALABAMA, 326 U. S. 501, 90 L ed. 265. In the Marsh case the issue was clear that the trespass statute of Alabama as applied to the defendant in the case could not be enforced because of the interposition of the First and Fourteenth Amendments guaranteeing freedom of the press and of religion, thus enabling the Appellant, or defendant, in that case to distribute religious literature on the streets of a company-owned town. It is clear that in the case now before the Court the constitutional rights of the Appellants were never denied. Indeed, the evidence shows that no sets of facts or circumstances were ever shown or produced which brought into play the application of the Fourteenth Amendment.

We have already cited and quoted from North Carolina cases showing that the Appellants did not properly present the question of former jeopardy. Under these circumstances we think the statement of this Court in the case of JOHN v.

PAULLIN, 231 U. S. 583, 585, 58 L ed. 381, 383, is appropriate. This Court, there said:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also:

C. I. O. v. McADORY, 325 U. S. 472, 477, 89 L. ed. 1741;
PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886;
CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190, 70 L. ed. 229;
C. & O. R. CO. v. McDONALD, 214 U. S. 191, 53 L. ed. 963;
HARDING v. ILLINOIS, 196 U. S. 78, 49 L. ed. 394.

In TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, it was held that where the State practice required a plea in abatement instead of a motion to quash that this Court would follow the State practice.

In BAILEY v. ANDERSON, 326 U. S. 203, 206-7, 90 L. ed. 3, this Court said:

> "Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va lxxv; cf. Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va 626, 628, 629, 59 S. E. 476, 17 LRA (NS) 324; Bliss v. Spencer, 125 Va. 36, 50, 99 S. E. 593, 5 ALR 619; Reynolds v. Adams, 125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virgina, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on ap-

peal, this court is without jurisdiction of the appeal. Jacobi v. Alabama, 187 U. S. 133, 135, 136, 47 L. ed. 106-108, 23 S. Ct. 48; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 23 S. Ct. 375, 63 LRA 33; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200. See Flournoy v. Wiener, 321 U. S. 253, 262, 263, 88 L. ed. 708, 714, 715, 64 S. Ct. 548, and cases cited."

In WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, this Court said:

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."

In EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, this Court said:

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617 (1906); Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 23 S. Ct. 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

See, also, the following cases:

LAYTON v. MISSOURI, 187 U. S. 356, 47 L. ed. 214;
MORRISON v. WATSON, 154 U. S. 111, 38 L. ed. 927;
BALDWIN v. KANSAS, 129 U. S. 52, 32 L. ed. 640;
BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;
SPIES v. ILLINOIS, 123 U. S. 131, 31 L. ed. 80.

The defendants made a motion in arrest of judgment in which was incorporated again the Motion to Quash, and under North Carolina practice these motions made after conviction are discretionary with the trial court and will not be reviewed by the Supreme Court (STATE v. CLYBURN, 247

N. C. 455, 101 S. E. 2d 295). Under North Carolina practice a motion in arrest of judgment will be allowed only for some fatal error or defect on the face of the record.

STATE v. McKNIGHT, 196 N. C. 259, 145 S. E. 281;
STATE v. BROWN, 218 N. C. 415, 11 S. E. 2d 321;
STATE v. BRYANT, 237 N. C. 437, 75 S. E. 2d 107.

The Appellants could easily have raised any federal questions they desired by introducing the record of the Federal Court into evidence into the trial of this case and by asking for special instructions to the jury. If the Appellants wish to raise the question as to whether or not they were relieved from the application of the statute because of privileges and immunities claimed under the Federal Constitution, they could have asserted and dictated these contentions into the Record under the general issue of Not Guilty and asked for a ruling of the trial judge in addition to any special instructions on these points. Having elected to stake all on an asserted estoppel resulting from the federal proceeding and having failed to properly present this to the Court and obtain a ruling thereon, we think the case of PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U. S. 447, 80 L. ed. 797, is in point, where this Court said:

"Plainly that was not enough. The Illinois statute requires that in cases involving construction of the Federal Constitution appeals from circuit courts shall be taken directly to the supreme court. And, as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional question was urged in the lower court, the ruling on it preserved in the record and the error assigned on appeal. While the order of that court transferring the case does not specify the grounds on which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. The appellate court so understood the grounds and effect of the order and held that by transferring the case the supreme court eliminated the constitutional ques-

> tions. As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them. Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617; Cox v. Texas, 202 U. S. 446, 452, 50 L. ed. 1099, 1102, 26 S. Ct. 671; Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 51, 58 L. ed. 1202, 1207, 34 S. Ct. 739."

Likewise, in BARBOUR v. GEORGIA, 249 U. S. 454, 63 L. ed. 704, Mr. Justice Brandeis, writing for this Court on a similar point, said:

> "The defendant raised, in his amended motion for a new trial, the further objection that the law was unconstitutional as applied to him, because the liquor had been acquired before the statute was enacted; but the trial judge denied the motion and declined to approve any of the grounds on which it was based. In accordance with the state practice its supreme court therefore refused to consider the point. Dickens v. State, 137 Ga. 523, 73 S. E. 826; Harris v. State, 120 Ga. 196, 197, 47 S. E. 573. Consequently the question is not before us (Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 51, 58 L. ed. 1202, 1207, 34 Sup. Ct. Rep. 739), and on it we express no opinion."

We again call the attention of the Court to the fact that the Appellants' whole argument shows that they have not really attacked the validity of the statute but the authority exercised under the statute, and, therefore, we say that no appeal lies to this Court under 28 USC sec. 1257-(2) because this Court said in WILSON v. COOK, 327 U. S. 474, 90 L. ed. 793:

> "For 'the mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis' of an appeal."

VI

THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON AN INDEPENDENT NON-FEDERAL GROUND SUFFICIENTLY ADEQUATE TO

SUPPORT THE STATE COURT JUDGMENT AND UPON A NON-FEDERAL GROUND THAT IS TENABLE.

The Supreme Court of North Carolina having decided that no federal question was properly presented before the trial court and that the effect of the federal judgment and findings of fact was not presented according to State practice, the decision rests upon a non-federal ground which is independent and adequately supports the State judgment.

BEREA COLLEGE v. KENTUCKY, 211 U. S. 53, 53 L. ed. 81;

FOX FILM CORP. v. MULLER, 296 U. S. 207, 210, 80 L. ed. 158;

HERB v. PITCAIRN, 324 U. S. 117, 125-126, 89 L. ed. 789.

The fact that federal cases were cited and discussed in the opinion of the Supreme Court does not necessarily mean that that Court passed upon any federal questions. On this point in BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, this Court said:

> "The majority opinion of the Supreme Court of California contains broad statements to the effect that specific performance of the arbitration award would violate the public policy of the State. Petitioner's constitutional arguments are based on the belief that these statements establish the ground on which the judgment below was based, and that therefore the decision below not only establishes a conclusive presumption of advocacy of violence from the mere fact of membership in the Communist Party, but renders unenforceable substantially all contracts entered into by members of the Party.
>
> "This Court, however, reviews judgments, not statements in opinions. Herb v. Pitcairn, 324 U. S. 117, 125, 126, 89 L. ed. 789, 794, 795, 65 S. Ct. 459; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 S. Ct. 995. See also Williams v. Norros (US) 12 Wheat 117, 118, 120, 6 L. ed. 571, 572. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case,

it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn, (US) supra; Williams v. Kaiser, 323 U. S. 471, 477, 89 L. ed. 398, 403, 65 S. Ct. 363."

The Supreme Court of North Carolina did not apply any rule in this case that it had not applied before. For example: In LANE v. SOUTHERN RY. CO., 192 N. C. 287, 293, 134 S. E. 865, the counsel for the defendant offered a deposition in evidence whereupon counsel for the plaintiff stated to the Court that they would object to such portions of the deposition as contradicted the allegations of defendant's answer. The Court then stated that it "would exclude all portions of the deposition tending to prove contributory negligence and which were in contradiction of defendant's pleadings." The defendant excepted to this statement of the Court and did not thereafter offer to read to the Court or to the jury any part of the deposition. In disposing of the matter and in holding that no ruling of the Court was presented by the assignment of error, the Supreme Court of North Carolina said:

"The general statement of the court, before defendant had read, or offered to read the deposition or any part of it, is not such a ruling upon the competency of evidence at the trial as may be made the ground of an exception. In order that an exception may be made the basis for an assignment of error, on appeal, it must be duly taken to a specific and definite ruling by the court upon a matter of law relative to the subject-matter of the controversy between the parties. After the statement by the court, defendant did not read or offer to read the deposition. The court therefore did not rule upon any specific testimony contained in the deposition; no ruling of the court upon the admissibility or competency of testimony offered by defendant as evidence upon the trial is presented by the assignment of error. Plaintiff did not object generally to the deposition; he objected only to such portions as might tend to contradict defendant's allegations with respect to contributory negligence. *Phillips v. Land Co.*, 174 N. C. 542; *Smith v. McGregor*, 96 N. C. 111."

We realize in determining the question of adequacy that this Court applies its own standards and judgment (BROAD RIVER POWER CO. v. SOUTH CAROLINA ex rel DANIEL, 281 U. S. 537, 540, 74 L. ed. 1023) but we submit that the decision of the North Carolina Supreme Court is in line with all of the authorities which support the use of State practice in the presentation of questions and that the basis of the decision is an independent matter (MINNESOTA v. NATIONAL TEA CO., 309 U. S. 551, 556, 84 L. ed. 920). We do not believe that it can be contended that the non-federal ground of this decision is a mere pretext or cloak to evade the decision of federal questions. If it should be thought that federal questions have been decided, then it is believed that the non-federal ground is adequate to support the judgment (ENTERPRISE IRRIG. DIST. v. FARMERS' MUT. CANAL CO., 243 U. S. 157, 163-4, 61 L. ed. 644).

CONCLUSION

The Appellee, State of North Carolina, contends that this appeal should be dismissed and the judgment below affirmed. Contrary to the Appellants' contention the Supreme Court of North Carolina has never at any time changed its interpretation of the Trespass Statute involved, and even if it had this would not be any ground for the assertion of a constitutional question (CAROLINA-VIRGINIA RACING ASSOCIATION v. CAHOON, ET ALS., 214 F. 2d 830, and cases cited; BRINKERHOFF-FARRIS TRUST & SAVINGS CO. v. HILL, 281 U. S. 673, 74 L. ed. 1107). The Constitution of the United States does not guarantee that the decisions of State courts shall be free from error or require that their pronouncements shall be consistent (WORCESTER COUNTY TRUST CO. v. RILEY, 302 U. S. 292, 82 L. ed. 268).

Where the proceedings of the State Court were conducted under the ordinary forms of criminal prosecution there is no denial of due process of law (MILLER v. TEXAS, 153 U. S. 535, 38 L. ed. 812).

The question of former jeopardy was not sufficiently raised

by Appellants under the State practice, and if it had been sufficiently presented under all the decisions the question is not substantial and is not of sufficient importance to warrant consideration by the United States Supreme Court. If such a question had been deemed to be substantial by this Court it would not have denied the Petition for Certiorari in STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert. den. 342 U. S. 381, 96 L. ed. 629.

The truth of the whole matter is that the Appellants staked their whole case on the effect of the Federal Court decision (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562, Affirmed CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425) and when this was not properly presented and was not passed upon by the Supreme Court of North Carolina the appeal of the Appellants should be dismissed.

Respectfully submitted,

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Justice Bldg.
Raleigh, N. C.